TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 13

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 2, 1958
CERTIORARI GRANTED JANUARY 19, 1959

[fol. 42] No. 13,320

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION FOR REVIEW—Filed April 26, 1957

To the Honorable Judges of the United States Court of Appeals for the Sixth Circuit.

1. The Petitioner seeks review of the Decision of the Tax Court of the United States entered January 31, 1957 finding for the Respondent for the following years and amounts:

Year	Income Tax	Additions to Tax		
		Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

2. That the tax imposed originated in the 18th district of Ohio and was filed with the Commissioner in the City of Cleveland, Ohio.

3. The Petitioner seeks a review of the above decision by virtue of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

(SGD.) F. N. ACKER,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1958

No. 553

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,

vs.

FRED N. ACKER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. 1] Docket No. 53,555

IN THE TAX COURT OF THE UNITED STATES

FRED N. ACKER, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

• • • •

[fol. 2] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM PETITION—Filed June 15, 1954

The Petitioner asks for a re-determination of the income tax liability set forth by the Commissioner of Internal Revenue in his notice of liability dated March 18, 1954 and as a basis of his proceedings alleges as follows:

1. That the tax imposed originates in the 18th district of Ohio. The alleged liability is for income taxes for the years 1947, 1948, 1949 and 1950 and aggregates the sum of $9,328.90 as follows:

		Penalties		
Year	Deficiency	Sec. 291-a	Sec. 294d-2	Sec. 294d-1-a
1947	$1,552.01	$388.00	$ 93.12	$155.20
1948	2,878.20	719.55	213.92	356.54
1949	1,215.36	330.84	90.70	151.16
1950	942.01	.....	86.64	144.40
Total	$6,587.28	$1,411.39	$484.38	$807.30

All as more fully set forth in Exhibit "A" attached to and made part of this petition.

2. The Petitioner brings into controversy all items of claimed Deficiency and Penalties except Dividends of $103.50 and Interest of $131.50. Consequently the amount involved is approximately $9,300.00.

3. The Petitioner alleges that the Commissioner erred in adding the following items of Deficiency and Penalties:

• • • •

[fol. 3] e). In imposing the following penalties under Section 294d-1-a of the Internal Revenue Code (Failure to file estimate):

Year 1947	$ 155.20
1948	356.54
1949	151.16
1950	144.40

f). In imposing the following penalties under Section 294d-2 of the Internal Revenue Code (Substantial underestimate of estimate):

Year 1947	$ 93.12
1948	213.90
1949	90.70
1950	86.64

[fol. 4] 4. The Petitioner bases his contention of error on the part of the Commissioner as follows:

* * * *

[fol. 5] e). The Petitioner maintains that there is no power in the Commissioner to impose any penalties under Section 294d-1-a of the Internal Revenue Code for failure to file a statement of estimated tax for the following reasons:

1. That under the facts and law of this case the powers of the Commissioner were exhausted by the imposition of the 25% penalty under Section 291-a of the Internal Revenue Code.

2. That the requirements of Section 294d-1-a are beyond the powers granted to the Congress of the United States because it implies the power of propheecy in the tax-payer which is not among the generally accepted attributes of the human species.

f). The Petitioner maintains there is no power in the Commissioner to impose any penalties under Section 294d-2 for substantial underestimation of estimate for the following reasons:

1. The defect of the parent section 294d-1-a communicates itself to defeat its dependent Section 294d-2.

2. The attempt to cumulate 294d-2 on top of section 294d-1-a is unwarranted under the law because the whole includes all of the parts.

• • • •

[fol. 6] • • •

• • • • •

[fol. 7] WHEREFORE the Petitioner prays that this Honorable Court re-determine the tax liability by eliminating the alleged Deficiency of $6,587.58 and Penalties of $2,741.32.

FRED N. ACKER.

(Verification omitted.)

[fols. 8-15] • • •

[fol. 16] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM ANSWER—Filed August 11, 1954

COMES NOW the Commissioner of Internal Revenue, by his attorney, Daniel A. Taylor, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies, as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that the amounts shown in the column headed "Sec. 291-a" correctly show the additions to tax asserted by the respondent with respect to section 291(a) of the Internal Revenue Code and as accurately set forth in Exhibit "A" attached to the petition.

2. Admits that the petitioner brings into controversy all items of claimed deficiency and penalties except dividends of $103.50 and interest of $131.50; denies the remaining allegations contained in paragraph 2 of the petition.

3. a) to f), inclusive. Denies the allegations contained in subparagraphs a) to f), inclusive, of paragraph 3 of the petition.

• • • •

4. e), f) and g). Denies the allegations contained in subparagraphs e), f) and g) and all subparagraphs and

subdivisions of subparagraphs c), f) and g) of paragraph 4 of the petition.

Denies generally each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

[fol. 17] WHEREFORE, it is prayed that this appeal be denied and that the respondent's determination be in all respects approved.

DANIEL A. TAYLOR, SEH
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

Of Counsel:

CLARENCE E. PRICE,
Regional Counsel,

S. EARL HEILMAN,
Assistant Regional Counsel,

JAMES F. KENNEDY, JR.
Special Attorney,
Internal Revenue Service.

[fol. 18]

[fol. 19] IN THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM OFFICIAL REPORT OF PROCEEDINGS BEFORE THE TAX COURT OF THE UNITED STATES

Courtroom No. 1,
Internal Revenue Building,
Washington D. C.,
Wednesday, June 6, 1956.

The proceedings in the above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE: HONORABLE STEPHEN E. RICE.

APPEARANCES:

FRED N. ACKER, ESQ., Petitioner, appearing on his own behalf.

JOHN J. LARKIN, ESQ., appearing on behalf of the Respondent.

* * * *

[fol. 20] STATEMENT BY MR. ACKER

Mr. Acker: * * *

[fol. 21] Now the next question is on the question of the failure to file. I am raising a constitutional point; that is, the failure to file an estimate on the ground that that is purely speculative, that it involves the power of prophecy, and it is a matter on which the Congress cannot legislate. And the next question involved, the Government takes the view that where you file no estimate at all and a tax is subsequently assessed, that that is a substantial underestimate of the estimate and therefore they can put on a double penalty.

The Court: Doubly so. The case is against you. The case was decided very recently, just two weeks ago.

Mr. Acker: Yes. I realize there are cases for and against on that, and of course I do not know how far they have (6) gotten beyond this court. It so happened I was involved in one of those cases, so I am thoroughly aware of that fact. I will of course take the case to the Court of Appeals, and I would expect this court I want to say to you more or less to take a position; that is, this court may

have felt that as the court administering this law it had to take that position, but that is argument of law rather than anything else.

* * * *

[fols. 22-31] * * *

* * * *

[fol. 32] COLLOQUY BETWEEN COURT AND MR. ACKER

Mr. Acker: * * *

Now on E, which is the question of the right of the (22) Government to demand an estimate, I deny that, and I am sincere in that. I don't file an estimate, and I have not at any time. I am willing to pay the price if I am wrong. No malice, just conviction.

And F goes along with the same idea on the theory that you cannot have the parts and the whole, and that of course is a legal question.

The Court: Of course we have already had a court review case on both of these points holding against you. I will have to hold against you, too. And the reconsideration only would be on appeal.

Mr. Acker: I can understand on these points, and I see that clearly. I get the attitude that the court has. I know that and appreciate that, and anticipate it.

The Court: All right.

* * * *

[fols. 33-35] * * *

* * * *

[fol. 36] IN THE TAX COURT OF THE UNITED STATES

MEMORANDUM FINDINGS OF FACT AND OPINION

Filed January 28, 1957

This proceeding involves the following deficiencies in income tax and additions thereto:

Year	Income Tax	Additions to Tax Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

[fol. 37] The issues to be decided are: (1) Whether respondent erred in determining that losses sustained by petitioner in 1947 and 1948 were deductible only as nonbusiness bad debts; (2) whether the respondent erred in determining that certain real estate taxes paid by petitioner in 1947, 1948, and 1949 were not allowable deductions under section 23(c) of the 1939 Code; (3) whether respondent erred in disallowing a deduction of $2,290 incurred by petitioner in 1950 for legal fees and a bond in connection with a legal proceeding; (4) whether there was reasonable cause excusing petitioner's failure to file declarations of estimate tax during each of the years in issue; and (5) whether the taxes and additions thereto sought to be imposed are so excessive as to constitute a taking of property without due process of law within the meaning of the Fifth Amendment of the Constitution.

Some of the facts were stipulated.

Findings of Fact

The stipulated facts are so found and are incorporated herein by this reference.

The petitioner, an attorney, was a resident of Cleveland, Ohio, during the years in issue. His returns for the years 1947, 1948, and 1949 were filed on October 2, 1952; his return for the year 1950 was filed on April 16, 1951. All such returns were filed with the former collector of internal revenue for the eighteenth district of Ohio.

In addition to his practice of law, petitioner, during the years in issue, was a stockholder or officer in several corporations. In 1947, he loaned one corporation in which he owned stock, $8,500, which loan became worthless during the year. He deducted such loss in full on his return for 1947. In determining the deficiencies herein, the respondent allowed the deduction of the loss as a nonbusiness bad debt.

In 1948, petitioner was forced to make good on his guaranty of the note of another corporation of which he was a stockholder, in the amount of $3,465.49. On his return for 1948, he deducted such payment in full. In de- [fol. 38] termining the deficiencies herein, the respondent allowed the loss as a nonbusiness bad debt.

In 1947, 1948, and 1949, petitioner paid taxes in the respective amounts of $990.86, $5,668.07, and $4,642.14 on certain land, the title to which was held by the Hall Road Land Company, a corporation. During those years, certain lots owned by the corporation were sold and the purchasers made payment to the corporation. Petitioner was the sole stockholder of the corporation and endorsed the checks in its name. A gain was realized on such sales but was not reported by petitioner on his income tax returns for such years.

In determining the deficiencies herein, respondent disallowed the deductions of the real estate taxes paid by petitioner.

In 1950, petitioner was convicted and imprisoned for wilful failure to file an income tax return for the year 1946. In connection with his defense, petitioner incurred legal fees in the amount of $2,200 and a bond cost of $90. Petitioner deducted such sums on his return for 1950. In determining the deficiencies herein, respondent disallowed such deductions.

Petitioner was not in the business of making loans to or guaranteeing loans of corporations during the years in issue.

Petitioner did not file declarations of estimated tax during any of the years in issue and failed to show reasonable cause excusing such failure to file.

Opinion

Rice, *Judge*: Petitioner appeared at the hearing in this case but filed no brief; nor did he ask for an extension of time within which to do so within the original time granted by the Court. At the close of the hearing, he stated: "I would be glad to have you rule against me on all of these things as a practical proposition because the more you rule against me the better my constitutional question becomes. And the amount of money involved does not concern me one whit. But if I am going to go [fol. 39] ahead with this case, I cannot have loose ends to say that I permitted the Government to take a judgment against me merely to create a special situation, and for that reason I am setting up the hardcore facts * * *"

Hence, although petitioner has not filed a brief, we do not deem the several issues with respect to the deficiencies to have been waived or conceded by him.

As to the issues with respect to the deduction of bad debt losses in 1947 and 1948 and the deduction of real estate taxes in those two years and in 1949, petitioner failed to carry his burden of proof. He offered no evidence except his own brief and wholly inadequate testimony as to the full facts surrounding both issues. Petitioner did not show that he was in the business of lending money to or financing corporations. The loss which he sustained in 1947 on the $8,000 loan to a corporation in which he was a stockholder is therefore deductible only as a nonbusiness bad debt. *Charles G. Beraciat*, 20 T. C. 808 (1953), affd. 211 F. 2d 575 (C. A. 3, 1954); *Jan G. J. Boissevain*, 17 T. C. 325 (1951). So also with respect to the loss sustained on his payment on the guaranty of the note of another corporation in 1948. Petitioner did not show that he was in the business of guaranteeing the loans of corporations, and the loss sustained by him in that year is deductible only as a nonbusiness bad debt. *Peter Stamos*, 22 T. C. 885 (1954); *George Arvedgood*, 21 T. C. 60 (1953); *Kate Baker Sherman*, 18 T. C. 746 (1952).

The respondent determined that the real estate taxes which petitioner paid in 1947, 1948, and 1949 were taxes paid on property owned by a corporation. Petitioner claimed that the corporation was a defunct entity but he nevertheless testified that it held title to land during the years in issue, sold such land, and received payment therefor in its name. He failed to prove his allegation that the corporation was merely his nominee, and the respondent's determination that his payment of taxes due by it was not deductible by him is sustained. *Sigmund Spitzer*, 23 B. T. A. 776 (1931).

[fol. 40] With respect to the legal fees and bond cost paid by petitioner in 1950 in his unsuccessful defense of the criminal action against him for failure to file an income tax return in 1946, he argues that such expenses were incurred to protect his reputation as an attorney and that his defense enhanced that reputation. That may be true; but, if so, it is of an incidental result of the

fact that the expenses were incurred in the unsuccessful defense of a criminal action and are therefore nondeductible. *C. W. Thomas*, 16 T. C. 1417 (1951); *Anthony Cornero Stralla*, 9 T. C. 801 (1947); cf. *Commissioner v. Heininger*, 320 U. S. 467 (1943).

Petitioner showed no reasonable cause excusing his failure to file declarations of estimated tax as required, and the additions to tax determined by the respondent under section 294(d)(1)(A) are accordingly sustained. We think petitioner's argument, stated in his petition, that the requirements of that section are beyond the powers granted to Congress because it implies power of prophecy on the part of a taxpayer is wholly without merit. Where no declarations of estimated tax are filed, the estimate is deemed to be zero and the respondent properly imposed additions to tax under section 294(d)(2) for substantial underestimate of estimated tax. *Marvin Marcy*, 26 T. C. — , filed August 31, 1956.

The petitioner attacked the imposition of the deficiencies and additions to tax here in issue on the grounds that the taxes proposed to be assessed against him are beyond the powers granted to Congress in Article I, Section 8 of the Constitution. This, he says, is so because the taxes sought to be imposed are so excessive as to constitute a confiscation of property without due process of law within the proscription of the Fifth Amendment. We think that argument without merit. It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act. *McCray v. United States*, 195 U. S. 27 [fol. 41] (1904); *Chairmont L. Eqtredt*, 112 Ct. Cl. 80 (1948); *John A. Gebelein, Inc. v. Milhoan'd*, 12 F. Supp. 105 (D. Md., 1935); *Toque v. M'Elliott*, 274 F. 960 (S. D. N. Y., 1921).

Decision will be entered for the respondent.

IN THE TAX COURT OF THE UNITED STATES

DECISION—Entered January 31, 1957

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed January 28, 1957, it is

ORDERED AND DECIDED: That there are deficiencies in income tax and additions to tax under sections 291(a), 294(d)(1)(A), and 294(d)(2) of the 1939 Code, due from the petitioner for the taxable years 1947, 1948, 1949, and 1950, as follows:

Year	Income Tax	Additions to Tax		
		Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(2)
1947	$1,552.01	$388.00	$155.20	$ 93.12
1948	2,878.20	719.55	356.54	213.92
1949	1,215.36	342.09	151.16	90.70
1950	942.01		144.40	86.64

(Signed) STEPHEN E. RICE,

Judge.

* * * *

[fol. 43] MINUTE ENTRY OF ARGUMENT AND SUBMISSION

(Omitted in printing)

IN UNITED STATES COURT OF APPEALS

JUDGMENT—Filed June 18, 1958

On petition to review a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the decision of the said Tax Court in this cause be and the same is hereby reversed insofar as it sustains the additions to tax under § 294(d)(2) of the Internal Revenue Code of 1939. In all other respects, the judgment is affirmed.

[fol. 44] No. 13320

IN UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PETITION for Review of Decision of the Tax Court of the United States

* * *

Before SIMONS, Chief Judge; MILLER, Circuit Judge, and MATHES, District Judge.

OPINION Decided June 18, 1958

MATHES, District Judge. The Tax Court sustained *in toto* respondent's determinations of deficiencies in petitioner's income tax and additions thereto under Int. Rev. Code of 1939: 291(a), 294(d)(1)(A), and 294(d)(2) for the years 1947-1950 inclusive.

Petitioner does not question here the correctness of the additions to tax under 291(a), but challenges the validity of all the deficiency determinations and additions to tax under 294(d)(1)(A) and 294(d)(2) for each of the years involved.

The facts, as set out in the Tax Court's Memorandum Findings of Fact and Opinion [16 CCH Tax Ct. Memo. 89 (1957)], are not in controversy. Petitioner is an attorney and a resident of Ohio. During the relevant period petitioner was a stockholder, in some instances the sole stockholder, in several corporations. All but one of the deficiency determinations in issue upon this review concern activities of petitioner with respect to one or more of those corporations.

Petitioner not only disputes the correctness of the Tax Court's application of the Code sections involved; he also [fol. 45] attacks the constitutionality in general of the income tax provisions of the Internal Revenue Code of 1939, and the constitutionality in particular of the requirement that a declaration of estimated tax be filed.

Inasmuch as the constitutional issues need not be reached if, as petitioner contends, the Tax Court incorrectly interpreted and applied the pertinent sections of the Internal Revenue Code of 1939, we turn first to the statutory questions. [See: *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568-575 (1947); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345-348 (1936) (concurring opinion of Mr. Justice Brandeis).]

In 1947, 1948, and 1949, petitioner personally paid real estate taxes on Ohio property owned by a corporation which in turn was wholly owned by him. Petitioner admits that title was kept in the corporation solely for his own convenience, that the property taxes were assessed against the corporation, and that within the period in question the corporation transacted business by selling some of the property. The Tax Court was clearly correct in sustaining respondent's determination that under the circumstances the property taxes were not deductible by petitioner. [Int. Rev. Code of 1939, 23 (c)-1; Treasury Regulation 111, 29.23(c)-1, 26 C.F.R. (1949); *Helvering* v. *Properties, Inc.*, 319 U. S. 436 (1943); *Maguire* v. *Supplee*, 316 U. S. 394 (1942); *Gilbert Corp.* v. *Commissioner*, 176 F. (2d) 141 (6th Cir. 1949); *Bolmes* v. *Commissioner*, 138 F. (2d) 779 (6th Cir. 1943); and see *Simon J. Murphy Co.* v. *Commissioner*, 231 F. (2d) 639 (6th Cir. 1956).]

In 1950 petitioner was convicted and imprisoned for willful failure to file an income tax return for 1946. In his unsuccessful defense of this criminal prosecution petitioner expended $2,290 for legal expenses and bond costs which he urges are deductible, apparently under Int. Rev. Code of 1939, 23(a), on the theory that defending against criminal charges is "an absolute necessity" for an attorney and that his fight in the criminal case greatly enhanced his reputation. The Tax Court properly sustained respondent's disallowance of this deduction. "A taxpayer who has been prosecuted under a federal or state statute and convicted of a crime has not been permitted a tax deduction for his attorney's fee." [*Commissioner* v. *Heininger*, 320 U. S. 467, 473 n. 8 (1943); *Estate of Albert E. MacCrone*, 14 CCH Tax Ct. Memo. 958 (1955), *aff'd. on this point and rev'd. on other grounds*, 240 F. (2d) 841 (4th Cir. 1956); see: *Tank*

[fol. 46] *Truck Rentals, Inc.* v. *Commissioner*, 356 U. S. 30 (1958); *Hoover Motor Express Co.* v. *United States*, 356 U. S. 38 (1958).]

In 1947 petitioner loaned $8,500 to a corporation in which he owned stock, and the loan became worthless during that year. In 1948 petitioner was required to pay a note which he had guaranteed for another corporation in which he owned stock, resulting in a $3,466.49 loss to him. Respondent determined that both of these losses were deductible only as non-business bad debts, required to be treated as short-term capital losses [Int. Rev. Code of 1939, 23(k)(4)], and so subject to the amount limitation specified in 117(d)(2) of the Internal Revenue Code of 1939. The Tax Court found that petitioner failed to show that he was in the business of lending money to or guaranteeing the loans of corporations, and so sustained respondent's determinations. We agree. Treasury Regulation 111 29.23(k)-6, 26 C.F.R. (1949); *Putnam* v. *Commissioner*, 352 U. S. 82, 92-93 (1956); *Wheeler* v. *Commissioner*, 241 F. (2d) 883 (2d Cir. 1957); *Commissioner* v. *Stinchfield*, 240 F. (2d) 381 (2d Cir. 1957); and see *McNeill* v. *Commissioner*, 251 F. (2d) 863, 866-867 (4th Cir. 1958).]

For the years 1947 through 1950 respondent imposed on petitioner and the Tax Court sustained additions to tax, both under 294(d)(1)(A) for failure to file a declaration of estimated tax, and under 294(d)(2) for substantial underestimation of estimated tax. Petitioner does not rely on the statutory excuse of "reasonable cause and not due to willful neglect" as to his failure to file the declarations. Rather, he maintains that the statutory provisions requiring the filing of a declaration of estimated tax are unconstitutional because "the enumerated powers of the Congress do not include any power to compel a citizen to prophesy. It is beyond any human ability and therefore not a subject for Congressional intervention."

Since petitioner makes no attempt to establish the statutory excuse, the Tax Court correctly applied the statute in sustaining imposition of the additions to tax under 294(d)(1)(A) for failure to file the declarations of estimated tax. And we hold with the Tax Court that petitioner's attack upon the constitutionality of the pro-

visions of the Internal Revenue Code of 1939 requiring the filing of a declaration of estimated tax, and imposing penalties for failure to file, is "wholly without merit." Such requirements are a valid exercise of the taxing [fol. 47] power conferred by Article I, S. and the Sixteenth Amendment of the Constitution. [*Erwin* v. *Granquist*, 253 F. (2d) 26 (9th Cir. 1958); *Walker* v. *United States*, 240 F. (2d) 601 (5th Cir.), *cert. denied*, 354 U. S. 939 (1957).]

Petitioner next contends that imposition of concurrent penalties under I. 294(d)(1)(A) and 294(d)(2) of the 1939 Code is without statutory warrant. The Tax Court held that petitioner's failure to file any estimate at all amounted to a zero estimate which, in turn, resulted in a substantial underestimate within the purview of 294(d)(2). This holding is in accord with Treasury Regulation 111, 29.294-1(b)(3)(i) [26 C.F.R. (1949)], and is supported by a long line of Tax Court decisions [see, among others: *Clarence E. Buckley*, 29 T. C. No. 50 (1957); *Marie Garrand*, 28 T. C. 1086, 1090 (1957); *Harold C. Harbat*, 28 T. C. 687, 692 (1957); *J. P. Abbott*, 28 T. C. 795, 808-809 (1957); *Anthony Delsanter*, 28 T. C. 845, 861-862 (1957); *Walter H. Kalkbrenner*, 28 T. C. 121, 126 (1957); *Marvin Marcus*, 26 T. C. 992, 996 (1956); *Harry Hartley*, 23 T. C. 353, 360, *modified*, 23 T. C. 564 (1954); *G. E. Fuller*, 20 T. C. 308, 316 (1953), *aff'd., on other grounds*, 213 F. (2d) 902 (10th Cir. 1954)], and by some District Court decisions [*Pehlivano* v. *United States*, 159 F. Supp. 98 (E. D. La. 1958); *Farmer* v. *United States*, 150 F. Supp. 581 (S. D. Ga. 1957); *Peterson* v. *United States*, 141 F. Supp. 382 (S. D. Tex. 1956)].

While this court has affirmed the Tax Court decisions which have sanctioned imposition of penalties under both 294(d)(1)(A) and 294(d)(2) where no declaration of estimated tax had been filed, examination of the briefs and appendices in those cases discloses that the propriety of imposing the penalty for substantial underestimation where no estimate at all had been filed was not raised in this court. [*John Fedorka*, 14 CCH Tax Ct. Memo. 652, 658 (1955), *aff'd., per curiam*, 237 F. (2d) 916 (6th Cir. 1956), *cert. denied*, 352 U. S. 1025 (1957); *Robert Fogel*, 14 CCH Tax Ct. Memo. 718, 728 (1955), *aff'd., per curiam*,

237 F. (2d) 918 (6th Cir. 1956); *R. M. Clayton*, 15 CCH Tax Ct. Memo. 105, 109 (1956), *aff'd., per curiam*, 245 F. (2d) 238 (6th Cir. 1957).] The question remains open for examination then as *res integra* here.

Even though this problem of concurrent penalties exists only under the 1939 Code, and cannot arise under the 1954 Code which expressly provides but a single penalty for underpayment of estimated tax [Int. Rev. Code of 1954, §§ 6651(c), 6654, and see 3 U. S. Code Cong. & Ad. News (1954) 4544, 4567, 5241-5242], the problem [fol. 48] remains an important one because of cases yet to be decided which will be ruled by the 1939 Code [see Int. Rev. Code of 1954, § 6654(d)].

The argument in support of the validity of that part of Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] declaring that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero," has been well stated in *Palmisano* v. *United States*, *supra*, 159 F. Supp. 98, and *Farrow* v. *United States*, *supra*, 150 F. Supp. 581. [See also *G. E. Fuller*, *supra*, 20 T. C. at 316.]

But to give effect to the quoted regulation presents a problem even greater than the logical difficulty encountered in saying that one who has filed no estimate at all has thereby underestimated his tax. [See *Barnwell* v. *United States*, 58-1 U.S.T.C. Par. 9374 (E. D. S. C. Feb. 4, 1958).] For although the Congress treated failure to file a declaration of estimated tax and substantial underestimation of tax as separate and distinct acts under the 1939 Code, and provided separate and different penalties for each, the regulation renders a taxpayer who has failed to file a declaration ipso facto subject to both the penalty for failure to file and the penalty for substantial underestimation. As the Tax Court itself observed in rebuffing another attempt of respondent to extend these penalties by implication: "If the legislature had intended such a result it would have had been a simple matter so to provide." [*Anthony Delsanter*, *supra*, 28 T. C. at 862.]

Moreover, inasmuch as the regulation imposes a penalty in addition to one expressly imposed by the statute

itself for the same omission, we are unable to perceive wherein the regulation is necessary to effectuate the statutory taxing scheme. Section 294(d) of the Internal Revenue Code of 1939 is penal in nature and to be strictly construed. [*Stephen* v. *Commissioner*, 197 F. (2d) 712 (5th Cir. 1952); *Barnacll* v. *United States*, *supra*, 58-1 U.S.T.C. Par. 8374; *Davis* v. *Dudley*, 124 F. Supp. 426, 429 (W. D. Pa. 1954); see *F. C. C.* v. *American Broadcasting Co.*, 347 U. S. 284, 296 (1954).] "Penalties are never extended by implication" [*Elliott* v. *Railroad Co.*, 99 U. S. 573, 576 (1878); *United States* v. *J. H. Winchester & Co.*, 40 F. (2d) 472 (2d Cir. 1930)], and "all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfried, Inc.* v. *Commissioner*, 162 F. (2d) 628, 633 (3rd Cir. 1947).]

Furthermore, even if the exactions involved be treated as "additions to Tax," as they are denominated by § 294 [fol. 49] of the 1939 Code, the regulation runs counter to the long established rule that "statutes levying taxes . . . are not to be extended by implication beyond the clear import of the language used." [*United States* v. *Merriam*, 263 U. S. 179, 187-188 (1923); *Crooks* v. *Harrelson*, 282 U. S. 55, 61 (1930); *Reinecke* v. *Gardner*, 277 U. S. 239, 244 (1928); *Gould* v. *Gould*, 245 U. S. 151, 153 (1917); *cf. Parker Pen Co.* v. *O'Day*, 234 F. (2d) 607, 609 (7th Cir. 1956).]

Mindful of the cogent reasoning of the Tax Court and District Court opinions sustaining the regulation, we nevertheless are of opinion that Treasury Regulation 111 § 29.294-1(b)(3)(i) [26 C.F.R. (1949)] is invalid insofar as it provides that "[i]n the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero." In so holding we are mindful too that, as the Tax Court and the District Courts have pointed out, Treasury regulations are presumptively valid. But we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, "unreasonable and plainly inconsistent with the revenue [statute]," and so cannot be sustained. [*Commissioner* v. *South Texas Lumber Co.*, 333 U. S. 496, 501 (1948).]

This conclusion is buttressed by the fact that it is in accord with that reached by the majority of the District Courts which have considered the problem. [*Barnwell v. United States*, *supra*, 58-1 U. S. T. C. Par. 9374; *Erwin v. Granquist*, 57-2 U. S. T. C. Par. 9732 (D. Ore. 1957), *aff'd.*, 253 F. (2d) 26 (9th Cir. 1958); *Powell v. Granquist*, 146 F. Supp. 308, 312 (D. Ore. 1956), *aff'd.*, 252 F. (2d) 56 (9th Cir. 1958); *Jones v. Wood*, 151 F. Supp. 678 (D. Ariz. 1956); *Stokes v. United States*, 150 F. Supp. 364 (N. D. Cal. 1957); *Hodgkinson v. United States*, 57-1 U. S. T. C. Par. 9294 (S. D. Cal. 1956); *Owen v. United States*, 134 F. Supp. 31, 39 (D. Neb. 1955), *modified on another point sub nom. Knop v. United States*, 234 F. (2d) 760 (8th Cir. 1956); *Todd v. United States*, 57-2 U. S. T. C. Par. 9768 (N. D. Ga. 1957); *Glass v. Dunn*, 56-2 U. S. T. C. Par. 9840 (N. D. Ga. 1956); *United States v. Ridley*, 127 F. Supp. 3, 11 (N. D. Ga. 1954); *United States v. Ridley*, 120 F. Supp. 530, 538 (N. D. Ga. 1954).]

The judgment of the Tax Court must therefore be reversed as to the additions to tax under § 292(d)(2). However, our conclusion that the claimed deductions were properly disallowed compels us nonetheless to reach [fol. 50] the constitutional issues raised as to the income tax provisions of the Internal Revenue Code of 1939.

Petitioner asserts that these income tax provisions are unconstitutional because: (1) the rates are so high as to make the levy not a tax but a confiscation of property contrary to the Fifth Amendment to the Constitution, (2) the progressive rates are unconstitutional, and (3) the "income tax law considered as a whole in its excessive rates and arbitrary provisions is openly subversive of the fundamental philosophy of the Constitution of the United States and repugnant to its continued existence."

The Tax Court summarily disposed of these constitutional issues with the statement: "It has long been recognized that where a taxing statute is within the power of Congress to enact, as clearly the Internal Revenue Code is, the fact that the rates provided thereunder may be excessive, confiscatory, or destructive does not invalidate the taxing act." [16 CCH Tax Ct. Memo. at 91.]

This declaration by the Tax Court completely over-

looks petitioner's arguments by assuming the very thing that he disputes, namely, whether the Congress has the power to enact an income tax law like that found in the Internal Revenue Code of 1939.

While holding that the court may not disturb the judgment of the Congress because of indirect effects of a statute that clearly represents an exercise of the taxing power [see, for example, *McCray* v. *United States*, 195 U. S. 27 (1904)], on more than one occasion the Supreme Court has adverted to the possibility that a law, although denominated a taxing statute, might not be a taxing statute at all, but one which on its face has crossed the boundary from the classification "tax" to the classification "taking," so as to become subject to the limitations of the Fifth Amendment to the Constitution. [*Stewart Machine Co.* v. *Davis*, 301 U. S. 548, 585 (1947); *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, 24 (1916).]

We know of no authority holding that the Congress may constitutionally enact a law which, although called a tax statute, on its face amounts to a taking of private property without compensation therefor. That such a law would fall within the area of "taking," rather than the area of "taxing," and so be subject to judicial nullification because of the limitations of the Fifth Amendment was clearly recognized by Mr. Chief Justice White speaking for the Court in *Brushaber* v. *Union Pacific R. R.*, [fol. 51] *supra*, 240 U. S. 1, where he pointed out that, despite the breadth of the taxing power conferred by the Constitution, there might arise "a case where although there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment, or, what is equivalent thereto, was so wanting in basis for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion." [240 U. S. at 24-25.]

This principle was also recognized by Mr. Justice Cardozo speaking for the Court in *Stewart Machine Co.* v. *Davis*, *supra*, 301 U. S. 548, when he wrote: "[W]e assume that discrimination, if gross enough, is equivalent

to confiscation and subject under the Fifth Amendment to challenge and annulment." [301 U. S. at 585.] Nor do we forget the ringing words of Mr. Justice Holmes when, in dissent, he declared: "The power to tax is not the power to destroy while this Court sits." [*Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U. S. 218, 223 (1928).]

Since the Tax Court applied an incorrect legal standard in judging petitioner's claim of unconstitutionality, it would be proper to remand the case to enable that court to weigh the evidence in light of correct legal standards. However, on surveying the entire record from which it appears that petitioner fully presented to the Tax Court both his constitutional arguments and his evidence supporting them, we think there is no reasonable basis in fact or law for a holding that the income tax provisions of the Internal Revenue Code of 1939 are unconstitutional either on their face or as applied to petitioner in this case.

The 1939 Code is unquestionably a taxing statute in substance as well as in name. The constitutionality of progressive tax rates is long settled. [*Knowlton* v. *Moore*, 178 U. S. 41 (1900); *Brushaber* v. *Union Pacific R. R.*, *supra*, 240 U. S. 1.] The classifications drawn in question here do not appear to be either arbitrary or unreasonable in any constitutional sense. To the contrary, in large part they represent "the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." [*Burnet* v. *Wells*, 289 U. S. 670, 676 (1933).] [fol. 52] Nor can we say that the rates of tax, admittedly high, have reached confiscation or a "taking" in the constitutional sense. Much as we may sympathize with petitioner's arguments about our tax plight, as judges we must say that he has addressed them to the wrong forum: they are for the Congress, and not for the courts.

For the reasons stated, the judgment of the Tax Court is reversed insofar as it sustains the additions to tax under 293(d)(2) of the Internal Revenue Code of 1939, but in all other respects the judgment is affirmed.

[fol. 53] IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 13,320

FRED N. ACKER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

PETITION OF THE RESPONDENT FOR REHEARING
Filed July 7, 1958

To The Honorable United States Court of Appeals for the Sixth Circuit and to the Judges Thereof:

The Commissioner, by his attorneys respectfully presents this petition for rehearing in this case in which an opinion, by the Honorable Judge Mathes, was rendered on June 18, 1958. The reasons for this petition for rehearing are as follows:

This Court concluded that Treasury Regulations 111, Section 29.294-1(b)(3)(i)(A), was unreasonable and invalid insofar as it provided that if a declaration of estimated tax was not filed then the amount of the estimated tax is zero for purposes of the addition to the tax on account of the substantial understatement of estimated tax provided by Section 294(d)(2) of the Internal Revenue Code [fol. 54] of 1939. This Court stated in its opinion "we think that in this instance considerations of reason and policy involved in construing statutes levying taxes and imposing penalties outweigh the presumption of validity; that the quoted provision of the regulation is, in other words, 'unreasonable and plainly inconsistent with the revenue [statute],' and so cannot be sustained" (Slip

Op. 6.) However, in view of the legislative history of Section 294(d)(2) we respectfully submit that the Court's conclusion is untenable.

Although the Commissioner did not set forth in his brief the legislative history involved in detail, the leading Tax Court case of *Fuller v. Commissioner*, 20 T.C. 308, affirmed on other grounds, 213 F. 2d 162 (C.A. 10th), which discusses that history, was cited, as well as other decisions. We respectfully urge that the Treasury Regulation in question could hardly be inconsistent with the statute (Section 294(d)), as this Court said (Slip. Op. 6), because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute. Treasury Regulations 111, Section 29.294-1(b)(3)(A), as amended by T.D. 5403, 1944 Cum. Bull. 349, provides:

> In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

In explaining the addition to the tax for substantial underestimate of tax when it was added to Section 294 in 1943 (Section 5(b), Current Tax Payment Act of 1943, [fol. 55] c. 120, 57 Stat. 126) in both the Senate Report and the Conference Report (S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1314, 1345); H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372)) it was stated:

> In the event of a failure to file any declaration where one is due, the amount of the estimated tax for the purposes of this provision will be zero.

In the leading Tax Court case of *Fuller v. Commissioner*, *supra*, an attack on the above-quoted Treasury Regulation was rejected in the following language (p. 316):

> The petitioners attack the regulation as being void in that it is short of the will of Congress. The regulation is couched in the same language used by Congress in its Conference Report on legislation covering this subject and follows the procedure therein prescribed. In short, petitioners argue that the regulation

actually reflects, rather than distorts, the will of Congress, and we uphold its validity.

This Court's statement that "the regulation renders a taxpayer who has failed to file a declaration *ipso facto* subject to both the penalty for failure to file and the penalty for substantial underestimation" (Slip. Op. 5) also seems, we respectfully submit, untenable. If Congress had not intended both additions to the tax to apply it could easily have so provided as it provided in Section 294(d)(1)(B) regarding the addition for failure to pay installments of estimated tax. The addition in [fol. 56] Section 294(d)(1)(B) for failure to pay is expressly limited to cases where a declaration of estimated tax was filed. Section 294(d)(2) providing for the addition to the tax for substantial underestimation has no similar provision making its addition and the failure to file addition of Section 294(d)(1)(A) interdependent. If no declaration of estimated tax is filed and the estimate is zero for purposes of the addition for substantial underestimation, as both the Committee Reports and the Treasury Regulation provide, it seems to follow that the addition for substantial underestimation must be imposed whenever no declaration is filed. In fact, the Court of Appeals for the Third Circuit has just reached a similar conclusion as shown by its remark in *Kaltreider* v. *Commissioner*, decided May 21, 1958 (1 A.F.T.R. 2d 58-1766):[1]

> The penalty for substantial underestimation of estimated tax under Section 294(d)(2) is not subject to a reasonable cause limitation nor indeed to any other defense. Where no declaration of estimated tax is filed the estimate is considered to be zero and the penalty mandatory.[19]

* * * *

[19] *Clark* v. *Commissioner* [253 F. 2d 745 (C.A. 3d)]; Treasury Regulations 111, Sec. 29.294-1(b)(2)(A).

[1] The imposition of both additions to the tax for failure to file and for substantial underestimation likewise was not distributed in the Fifth Circuit's case of *Anderson* v. *Commissioner*, 250 F. 2d 242, and in the Ninth Circuit's case of *Baumgardner* v. *Commissioner*, 251 F. 2d 311.

[fol. 57] That the additions to tax may be imposed for both failure to file the declaration and for a substantial underestimate in the same taxable year is also shown by the Committee Reports to the 1954 Code. The 1954 Code eliminated the addition to tax for failure to file a declaration (Section 6651(d) (26 U.S.C. 1952 ed., Supp. II, Section 6651)) except in the case of wilful failure (Section 7203 (26 U.S.C. 1952 ed., Supp. II, Section 7203)). The 1954 Code combined the three additions into a single one for underpayment of the estimated tax and based the addition upon 6% per annum of the amount of the underpayment for the period of the underpayment (Section 6654 of the 1954 Code (26 U.S.C. 1952 ed., Supp. II, Section 6654)).

In explaining this change the Committee Reports point out that the 1939 Code additions to tax for failure to file and for a substantial underestimate would both apply for the same taxable year (H. Rep. No. 1337, 83d Cong., 2d Sess., p. 100 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4127)):

> Additional charges are imposed under the present law for failure to file a declaration or make a payment of the estimated tax or for substantial underestimates of tax liability. These charges may be severe. For failure to file a declaration or to pay an installment of the estimated tax, the total charge may be as high as 9 percent of the unpaid installment. For a substantial underestimate of tax, that is, an estimated tax which is less than 80 percent of the actual tax liability for the year (66 2/3 percent in the case of farmers), a charge of 6½ percent [fol. 58] of the amount by which the final tax liability exceeds the estimated tax may be imposed. This charge and the charge for failure to file a declaration or pay an installment of estimated tax may run concurrently and result in a combined charge of 15 percent of the estimated tax due.

See also, S. Rep. No. 1622, 83d Cong., 2d Sess., p. 135 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4769).

*It is true, as this Court observed (Slip Op. 6), that there are District Court cases holding that the addition to tax under Section

We submit, therefore, that the language of Treasury Regulation, Section 29.294-1(b)(3)(A), is fully in accord with the language of Section 294(d)(1)(A) and (d)(2) of the statute and with the legislative history of the section's enactment which shows a clear intent that both additions should be applicable for the same taxable year.

The Regulations must be sustained unless unreasonable and plainly inconsistent with the statute which they interpret; they are not to be overruled except for weighty reasons. *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501, rehearing denied, 334 U. S. 813; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100; *Brewster* v. *Gage*, [fol. 59] 280 U.S. 327. Moreover, the Regulations "long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received Congressional approval and have the effect of law". *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Gas Blass Co.* v. *Commissioner*, 204 F. 2d 327 (C.A. 8th). Congress has seen fit to legislate with respect to the sections of the Code here involved several times since 1943.[3] It has in no way indicated disapproval of the Treasury Department's interpretation of the statute as reflected in

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294(d)(2) cannot be applied where no declaration of estimated tax was filed. These cases stem from *United States* v. *Ridley*, 120 F. Supp. 530 (N.D. Ga.), and we do not believe that these cases are sound. The Revenue Service has announced it will adhere to *Fuller* v. *Commissioner*, *supra*, and will not follow *United States* v. *Ridley*, *supra*. Rev. Rul. 55-224, 1955-1 Cum. Bull. 414.

[3] The provisions of the Code involved are Section 58 relating to the requirement of filing a declaration of estimated tax, Section 59 relating to payment of the estimated tax; Section 60 relating to special rules for application of Sections 58 and 59, Section 291 relating to the failure to file a return and Section 294 relating to additions to the tax in case of nonpayment, etc. The following amendments and reenactments have occurred without disturbing the regulative provision here involved. Section 118, Revenue Act of 1943, c. 63, 58 Stat. 21; Section 13, Individual Income Tax Act of 1944, c. 210, 58 Stat. 234; Section 202(a), Revenue Act of 1948, c. 168, 62 Stat. 110; Section 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; Section 208(d)(4), Social Security Act Amendments of 1950, c. 809, 64 Stat. 477; Section 221(g), Revenue Act of 1950, c. 994, 64 Stat. 906; and Section 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452.

its Regulations. The re-enactment doctrine should have, therefore, considerable force. *Helvering* v. *Winmill*, *supra*.

WHEREFORE, it is respectfully urged that this petition for rehearing be granted and that this Court's opinion dated June 18, 1958, be modified so as to sustain the [fol. 60] validity of the Treasury Regulation, Section 29.294-1(b)(3)(A), and uphold the Tax Court's decision that imposition of the additions to the tax for failure to file and for substantial underestimation was proper.

Respectfully submitted,

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July, 1958.

[fol. 61] CERTIFICATE OF COUNSEL

(Omitted in printing)

[fol. 62] No. 13320

IN UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED N. ACKLE, PETITIONER,

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ORDER ON PETITIONS FOR REHEARING
Filed September 3, 1958

Petition for Review of Decision of the Tax Court of the United States.

Before: SIMONS, Chief Judge, MILLER, Circuit Judge, and MATTHES, District Judge.

PER CURIAM.

Each party has petitioned for a rehearing. Petitioner but restates a portion of his earlier argument.

Respondent, however, now advances the contention that "the Treasury Regulation in question could hardly be inconsistent with the statute . . . because the language of the Treasury Regulation is almost identical to the language used by Congress in the Committee Reports dealing with the statute." [Compare Treasury Regulation 111 29.294-1(b)(3)(i), 26 C.F.R. (1949) with S. Rep. No. 221, 78th Cong., 1st Sess. 42 (1942 Cum. Bull. 1314, 1345), and H. R. Rep. No. 510, 78th Cong., 1st Sess. 56 (1943 Cum. Bull. 1351, 1372).]

Respondent also calls to our attention the recent decisions of *Patchen* v. *Commissioner*, . . . F. 2d . . . (5th Cir., July 23, 1958), *Abbott* v. *Commissioner*, . . . F. 2d . . . (3rd Cir., July 31, 1958), and *Hanson* v. *Commissioner*, . . . F. 2d . . . (9th Cir., Aug. 4, 1958). These decisions, rendered [fol. 63] subsequent to the publication of our opinion in this case, express disagreement with our holding that the penalty for failure to file a declaration of estimated tax [Int. Rev. Code of 1939, 294(d)(1)(A)] and the penalty for substantial underestimation of estimated tax [*id.*

294(d)(2)] cannot be imposed concurrently so as to work the exaction of a double penalty.

In the *Patchen* case the learned Court of Appeals for the Fifth Circuit appears to credit as authority decisions of this Court in which the problem was never raised. [See footnote 15 citing *Engel v. Commissioner*, 237 F. 2d 918 (6th Cir. 1956) and *Clarion v. Commissioner*, 245 F. 2d 238 (6th Cir. 1957).] See also 5 Rabkin, Federal Income Taxation Par. 153 at page 191 (Aug. 8, 1958).]

In the *Abbott* case the learned Court of Appeals for the Third Circuit recognizes that: "An examination of the underestimation provisions of Section 294(d)(2), taken alone, leaves unanswered the question of whether the penalty provided should be imposed where no declaration of estimated tax is filed." [*Abbott v. Commissioner*, *supra*, ... F. 2d at ....] The Court then observed that "[t]he statute being ambiguous, resort to legislative history is proper in an endeavor to ascertain Congressional intent" [*Ibid.*] and concluded from the legislative history that the Congress intended the double penalty since "the regulation is precisely in accord with the Congressional intent expressed in the conference report." [*Ibid.*]

In the *Hancock* case the learned Court of Appeals for the Ninth Circuit likewise got lodged from the legislative history that "[n]o other conclusion is possible but that Congress intended" to provide in the Act for the double penalty. [*Hancock v. Commissioner*, *supra*, ... F. 2d at ....]

However, it has long been our view that "such an [intention of the Congress must be gathered from the language of the Act. . . ." [*United States v. Strang*, 109 F. 2d 891, 893 (6th Cir. 1940); see also *Hopkins v. Commissioner*, 144 F. 2d 683, 692 (6th Cir. 1944).]

"Further", as the Court of Appeals for the Third Circuit has pointed out on another occasion, "it is well settled that in the application of penalties, all questions in doubt must be resolved in favor of those from whom the penalty is sought." [*Hatfield, Inc. v. Commissioner*, 162 F. 2d 628, 633 (3rd Cir. 1947).]

[fol. 64] While our great respect for the learning and acumen of the Courts of Appeals for the Third, Fifth, and Ninth Circuits naturally gives us pause, we are none

theless of opinion that the challenged regulation authorizing imposition of double penalties cannot be validated by the fact that it is substantially a quotation from the Congressional committee reports.

It seems to us a policy of first order that taxpayers under this "government of laws and not of men" be entitled to expect that whenever the Congress intends to exact a penalty for a particular omission, this will be done by unequivocal language embodied in a statute regularly enacted conformably to the Constitution, and not by a committee report that is neither voted on by the members of both Houses nor submitted to the President for his approval. [U. S. Const. Art. I, § 7, cls. 2, 3; Amend. XVI; see *Landstaff v. Lucas*, 9 F. 2d 691, 692-693 (W.D. Ky. 1925), *aff'd upon the opinion of the District Court*, 13 F. 2d 1022 (6th Cir.), *cert. denied*, 273 U.S. 721 (1926); *Massachusetts Corp. v. Higgins*, 194 F. 2d 257, 260 (5th Cir. 1952); *Helvering v. Reisman Motors, Inc.*, 128 F. 2d 584, 587-588 (5th Cir. 1942).]

Especially is this so where, as in the case at bar, the penalty sought to be imposed by administrative regulation is cumulative with and in addition to another penalty clearly and expressly imposed by the statute for the identical omission. Such a regulation is an attempted expansion and extension of the statute tantamount to an amendment thereof, and neither "presumptions of validity" nor "reenactment doctrines" can serve to validate it. [*United States v. Calamaro*, 354 U.S. 351, 358-359 (1957); *Koshland v. Helvering*, 298 U.S. 441, 446-447 (1936); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134-135 (1936); *Lincoln Elec. Co. Employees' Profit Sharing Trust v. Commissioner*, 191 F. 2d 320, 330 (6th Cir. 1951); *Landstaff v. Lucas*, *supra*, 9 F. 2d at 692-693; see *United States v. Hearst*, 197 F. 2d 803, 805 (9th Cir.), *cert. denied*, 344 U.S. 855 (1952).]

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law." [*Merrill v. Jones*, 106 U.S. 466, 467 (1882).]

Each of the petitions for rehearing is denied.

* * * *

(fol. 65) Clerk's Certificate to foregoing transcript omitted in printing

[fol. 66] SUPREME COURT OF THE UNITED STATES

No. 553, October Term, 1958

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

FRED N. ACKER

ORDER ALLOWING CERTIORARI—JANUARY 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.